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October 19, 2004

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Federal Communications Commission
Office of Secretary

VIA HAND DELIVERY
Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

RE: Unbundled Access to Network Elements; Review of Section 251 Unbundling Obligations for Incumbent Local Exchange Carriers, WC Docket No. 04-313, CC Docket No. 01-338

Dear Ms. Dortch:

Pursuant to the Commission's filing requirements, the following are being provided with this letter:

- One original and four copies of Verizon's Reply Comments and Supporting Materials in paper form, redacted for public inspection. The material includes Verizon's Reply Comments and one volume of supporting declarations and attachments.
- One original CD-ROM disc and four copies containing Verizon's Reply Comments and Supporting Materials, in electronic form, redacted for public inspection.
- One original of only those portions of Verizon's Reply Comments and Supporting Materials that contain confidential information. The confidential material includes one volume of confidential material in paper form.

Some of the materials we are submitting include confidential information. One copy of this letter will also accompany the confidential portions of the filing. None of this information is disclosed to the public, and disclosure would cause substantial harm to the competitive position of Verizon. As such, we are requesting that these portions of the Reply Comments receive confidential treatment by the Commission.

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Please date-stamp the extra copy of this letter and return it to the individual delivering this package.

We are submitting a copy of Verizon's Reply Comments and Supporting Materials, in paper and electronic form, redacted for public inspection, to Best Copy (the Commission's copy contractor). In addition, a total of five copies of the Reply Comments and Supporting Materials in paper form and five CD-ROM versions of the Comments and Supporting Materials in electronic form, all redacted for public inspection, are being provided to Janice M. Myles, Wireline Competition Bureau, Competition Policy Division, 455 12th Street, S.W., Suite 5-C327, Washington, D.C. 20554. One copy of the confidential portions of this filing is also being provided to Janice M. Myles.

All inquiries relating to access (subject to the terms of any applicable protective order) to any confidential information submitted by Verizon in support of this Application should be addressed to:

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Thank you for your assistance in this matter.

Sincerely,

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	
Unbundled Access to Network Elements	WC Docket No. 04-313
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	CC Docket No. 01-338

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October 19, 2004

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ATTACHMENTS

Attachment A.	Reply Declaration of Alfred E. Kahn and Timothy J. Tardiff Submitted in Support of the Comments of the Verizon Telephone Companies (Impairment)
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Attachment C.	Reply Declaration of William E. Taylor on Behalf of Verizon (Special Access Pricing)
Attachment D.	Reply Declaration of Robert F. Pilgrim (Competitive Fiber)
Attachment E.	Reply Declaration of Claudia P. Cuddy (Out-of-Region Markets)
Attachment F.	Reply Declaration of Lynn W. Walker (State Proceedings)
Attachment G.	Reply Declaration of Thomas Maguire (Hot Cuts)
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Attachment J.	Carrier Materials
Attachment K.	Examples of Non-UNE Competitors That Did Not Submit Comments

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REPLY COMMENTS OF VERIZON[1]

INTRODUCTION AND SUMMARY

Competitors are not impaired without unbundled access to incumbents' high-capacity facilities and circuit switches. The record evidence here demonstrates that, with respect to high-capacity services — including services at the DS1 and DS3 level — carriers are competing successfully wherever demand exists for such services, using their own facilities, facilities obtained from alternative providers, or special access from incumbent LECs. With respect to the mass market, cable companies, Voice over IP ("VoIP") providers (including AT&T), and wireless companies are offering voice service to customers across the country that competes directly and successfully on price, quality, and functionality with incumbents' wireline service. The development of this robust intermodal competition is not surprising — it is the norm in capital intensive industries, where railroads, for example, compete not just with other railroads, but also with barges, trucks, and airplanes — and is exactly what the Telecommunications Act of

[1] The Verizon telephone companies ("Verizon") are identified in Appendix A to Verizon's comments.

1996 sought to encourage. In light of this evidence, and the legal standards the Supreme Court and courts of appeals have established, the Commission cannot find impairment with respect to — and, therefore, cannot require unbundling of — the facilities at issue here. Adopting lawful rules that conform to the standards prescribed by the 1996 Act, moreover, will provide the industry and consumers with the certainty necessary to spur investment in the nation's broadband future.

The CLECs, true to form, insist that impairment exists with respect to these facilities and, even where it does not, plead for continued access to incumbents' networks at TELRIC rates for years to come. But their claims are based on conclusory assertions, anecdotes, and speculation — none of which constitutes the substantial evidence necessary for the Commission to find impairment. Indeed, in marked contrast to the comprehensive and detailed evidence that Verizon and other incumbents filed, *not a single CLEC* has submitted maps of its fiber network, a list of the streets its network serves, or the locations (such as wire centers) to which its network connects. Nor has any CLEC identified the routes on which it relies on other companies' networks or the capacity of the facilities it obtains. No CLEC has provided the locations where — let alone the capacity at which — it serves end-user customers, whether using its own facilities, other competitive facilities, or special access. And literally dozens of competitors — including competing fiber suppliers (such as Level 3), cable companies (such as Comcast), and VoIP providers (such as Vonage) — filed no comments at all. This information is unquestionably and uniquely within the CLECs' possession, but by withholding it the CLEC commenters put the Commission in the untenable position of having to evaluate their assertions of impairment without access to the most relevant data. Their failure to present probative

evidence within their possession, moreover, strongly suggests that they know that data would thoroughly undermine their assertions of impairment.

What the CLECs have presented, moreover, is woefully insufficient. Numerous CLECs rely on the so-called "QSI Report," which is a presentation by the CLECs' own witnesses of a subset of data from 14 state commission proceedings. As an initial matter, data from the state commission proceedings cannot provide a basis for impairment findings here. Not only were incumbents' data presentations constrained by the compressed timeline for the state proceedings and the unlawful triggers that had to be met, but CLECs purposefully withheld evidence based on tortured interpretations of the *Triennial Review Order*,[2] which led AT&T, MCI, and others to claim that their extensive fiber networks contained *not a single* self-deployed transport facility. But the CLEC witnesses do not even present the Commission with the actual data compiled by the state commissions, extremely limited as it is. Instead, they have applied a series of filters for the express purpose of excluding evidence of actual competition without UNEs. For example, based on the claim that CLECs cannot use self-deployed fiber to provide DS1 or DS3 transport — a claim contradicted by dozens of CLECs' websites and public statements, as well as by basic engineering realities — they simply excluded that fiber from their "analysis." The QSI Report, in the end, is no different from the other conclusory assertions that CLECs have made in support of their claims of impairment.

What the actual evidence in the record demonstrates is that the market for high-capacity facilities and services remains a mature, competitive market. Wherever demand for such

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[2] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*") (subsequent history omitted).

facilities and services exists, carriers are successfully competing to serve that demand using a combination of their own or alternative facilities and special access. This is true because the demand for high-capacity services at all capacity levels is highly concentrated — for DS1 and DS3 special access, 80 percent of the demand is concentrated in 12 percent and 4 percent of Verizon's wire centers, respectively, with the overwhelming majority of those wire centers located in Verizon's top 40 Metropolitan Statistical Areas ("MSAs"). This concentration, as the Commission has recognized, makes the market for high-capacity services ideally suited for competitive supply. Competing carriers have taken advantage of the opportunities this concentration presents, with an average of 20 fiber networks in each of the top 50 MSAs in the country. Despite their claims here and before the state commissions, the CLECs that have deployed these networks advertise end-user services at all capacity levels, from DS1 through OCn. And dozens of these CLECs — as well as third-party aggregators that provide access to hundreds of thousands of buildings — also publicly state that they offer capacity to other carriers, again at capacity levels ranging from DS1 through OCn. Verizon's own experience competing out-of-region confirms the availability of such competitive wholesale facilities.

Competitors are also successfully serving business customers of all shapes and sizes using special access services purchased from Verizon, either exclusively or to supplement their own facilities and facilities leased from other carriers. Indeed, on every measure, CLECs that use Verizon's network to provide high-capacity services overwhelmingly purchase special access rather than UNEs. This is true for all competing carriers, which purchase more than 93 percent of DS1 loops and more than 98 percent of DS3 loops as special access. And it is no less true when the traditional interexchange carriers ("IXCs") and wireless carriers are excluded — more

than 90 percent of the DS1 loops and more than 97 percent of the DS3 loops these other carriers purchase are obtained as special access. Despite CLECs' assertions that they cannot compete successfully or profitably using special access, the facts show — as ALTS admits — that CLECs relying primarily or exclusively on special access, such as Time Warner Telecom, PAETEC, US LEC, and Pac-West, have reported positive EBITDA. Moreover, in contrast to the CLECs' unsupported claims, the prices for special access services in general, and DS1 service in particular, have fallen in recent years. As the D.C. Circuit made clear, the Commission "must consider" competitors' ability to compete using special access and, where competitors can do so, they cannot be found "to be impaired by having to purchase special access services from ILECs."[3]

With respect to mass-market switching, technological and market developments in the 18 months since the *Triennial Review* proceeding have resulted in extensive competition for mass-market switching throughout the country without reliance on unbundling switching or the UNE platform. This includes circuit-switched voice service by cable companies, offered to 15 percent of homes nationwide; VoIP service by cable companies, offered to 40 million customers by the end of 2005; VoIP service from multiple other providers, including AT&T and Vonage, offered to any customer with a broadband Internet connection; and wireless service, which has entirely replaced landline service for 7-8 percent of customers and now carries nearly 30 percent of all voice traffic and 40 percent of all long-distance traffic. The competitors that seek to preserve unbundled switching and the UNE-P, however, would have the Commission ignore this clear record of robust, nationwide intermodal competition. Indeed, they propose market definitions

[3] *USTA v. FCC*, 359 F.3d 554, 592 (D.C. Cir. 2004) ("*USTA II*"), *cert. denied, NARUC v. USTA*, Nos. 04-12, 04-15 & 04-18 (U.S. Oct. 12, 2004).

for the sole purpose of excluding intermodal competitors and assert that intermodal alternatives can be ignored because they do not match legacy POTS service in every possible respect. These attempts are unlawful as a matter of basic principles of market definition and because they violate the D.C. Circuit's clear holding that the Commission must consider both intramodal and intermodal competition. Their claims are also wrong as a matter of economics — a rival technology need not be considered equal in quality by all potential customers, or even available to all potential customers, to constrain the pricing of ILEC voice services and, therefore, to be included in the same product market. And they are refuted by a simple, incontrovertible market fact — AT&T, formerly the largest UNE-P provider in the nation, is now competing in the mass market through VoIP and "no longer seeks permanent rules that require the unbundling of mass market switching and the maintenance of UNE-P." AT&T at i.

Finally, the Commission should use this proceeding to eliminate any doubt that, unless this Commission finds impairment under 47 U.S.C. § 251(d)(2), incumbents have *no* obligation to provide access to a network element as a UNE at TELRIC rates. Any state commission decision purporting to establish such an obligation is inconsistent with — and therefore preempted by — federal law. The Commission should also adopt rules that promptly move the market from the prior, unlawful regime of maximum unbundling to a lawful regime, thereby correcting the consequences of its vacated unbundling rules. And the Commission should reaffirm its exclusive jurisdiction over § 271 and network elements that must be unbundled solely pursuant to § 271, and should make clear that state commissions have no authority to regulate these 271 elements.

I. SUPREME COURT AND D.C. CIRCUIT PRECEDENTS PROVIDE A CLEAR AND BINDING FRAMEWORK FOR THE COMMISSION'S IMPAIRMENT ANALYSIS

The Supreme Court's and D.C. Circuit's decisions in *Iowa Utilities Board*,[4] *Verizon*,[5] *USTA I*,[6] *CompTel*,[7] and *USTA II* provide the Commission with a clear roadmap for a lawful interpretation and implementation of the unbundling standard in § 251(d)(2). In their comments here, the CLECs repeatedly encourage the Commission either to ignore entirely or to try to sidestep the key principles established by these binding judicial decisions. Doing so would merely guarantee a fourth consecutive vacatur of its UNE rules, by a court already frustrated by the Commission's "apparent unwillingness to adhere to prior judicial rulings." *USTA II*, 359 F.3d at 595.

The CLECs have learned *none* of the lessons of these decisions. First, they continue to argue that the Commission should make findings of impairment based on nothing more than their assertions and anecdotes. Not a single CLEC commenter has submitted the data necessary to evaluate their allegations of impairment — such as maps of where they are competing using their own facilities, third-party facilities, or ILEC special access, or of where they are enabling other competitors to offer service using their facilities. And any number of companies that are actually competing successfully today without UNEs — including Cox, Cablevision Lightpath, Comcast Business, Level 3, Looking Glass, and Vonage — have sat this proceeding out, depriving the Commission of their information as well. It would be grave error for the Commission, yet again,

[4] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

[5] *Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002).

[6] *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*"), *cert. denied*, 538 U.S. 940 (2003).

[7] *Competitive Telecomms. Ass'n v. FCC*, 309 F.3d 8 (D.C. Cir. 2002) ("*CompTel*").

to "make findings on the basis o[f] what one party asserts" — a practice that rightly "troubled" the D.C. Circuit in *USTA II*, where it reaffirmed that unbundling can be required only where the Commission determines, based on substantial record evidence, that impairment exists.[8]

Second, the CLECs continue to argue that the Commission should order unbundling first — by presuming impairment — and conduct the necessary impairment inquiry later. They insist that the Commission must find impairment wherever markets are not already fully competitive. They argue for unbundling based on the preferences, and for the benefit, of particular competitors. They claim that, having considered the costs of unbundling in the broadband context, the Commission is free to ignore those costs in the narrowband context. They contend that the Commission should disregard intermodal competition and competition using ILEC special access. They claim that the Commission can treat every discrete point-to-point loop and transport route in the country as a unique market. And they maintain that the Commission should rely on low retail rates as a source of impairment. But the D.C. Circuit rejected *all* of these claims in *USTA II*, and many were rejected for the second or third time. If the Commission repeats these errors yet again, it can be assured that a court will vacate the Commission's rules for a fourth time.

Third, the CLECs pretend that the D.C. Circuit approved of all aspects of the *Triennial Review Order* that it did not expressly reject. But the D.C. Circuit had *multiple* reasons for vacating the Commission's rules requiring unbundling of mass-market switching and high-capacity facilities. The Court found not only that the Commission had unlawfully delegated authority to state commissions, but also that the Commission's impairment findings were

[8] Transcript of Oral Argument at 32-33, *USTA II*, Nos. 00-1012, *et al.* (D.C. Cir. Jan. 28, 2004); *see USTA II*, 359 F.3d at 582.

independently unlawful. The court, therefore, had no reason to decide whether the Commission's rules with respect to these elements were unlawful for *still further* reasons. *See, e.g.*, *USTA II*, 359 F.3d at 572 ("this is not the occasion for any review of the Commission's impairment standard as a general matter"). As Verizon has shown, the other aspects of the *Triennial Review Order* on which the CLECs rely — such as the triggers — are directly contrary to the determinations that the D.C. Circuit made in *USTA II*, as well as to prior Supreme Court and D.C. Circuit precedents. The Commission cannot accept the CLECs' contention that the aspects of the *Triennial Review Order* that were not expressly rejected passed judicial muster.

In its opening comments, Verizon laid out the key principles established in *Iowa Utilities Board*, *Verizon*, *USTA I*, *CompTel*, and *USTA II*. Below, Verizon reviews those principles and addresses the various claims that commenters have raised, which directly flout them.

1. The Commission may impose a UNE obligation only after it first makes a finding of impairment, based on substantial evidence, and after it appropriately takes into account the costs of mandating unbundling. *See* Verizon Comments at 6-12.

a. The Commission cannot order *any* unbundling in *any* geographic market or market segment unless it *first* finds that CLECs would be impaired without UNE access in that market.

This principle has been clear since *Iowa Utilities Board* and repeatedly reaffirmed. Thus, the Supreme Court held that Congress did not establish an "underlying duty to make all network elements available," to which the Commission could "create isolated exemptions" as a matter of "regulatory grace," but instead required the Commission to "determine on a rational basis *which* network elements must be made available." *Iowa Utils. Bd.*, 525 U.S. at 391-92. In *USTA I*, the

D.C. Circuit reaffirmed that Congress "made 'impairment' the touchstone" in determining which specific elements incumbents must provide as UNEs. 290 F.3d at 425. In *USTA II*, the D.C. Circuit faulted the Commission for presuming impairment everywhere when "evidence indicated the presence of many markets where CLECs suffered no impairment in the absence of unbundling." 359 F.3d at 587. The Commission itself has acknowledged that it cannot "impose [UNE] obligations first and conduct [the] 'impair' inquiry afterwards." *Supplemental Order Clarification*[9] ¶ 16.

The CLECs, however, claim that "impairment should be *presumed*" or that the Commission should make "default" or "preliminary" findings of impairment. *E.g.*, ALTS *et al.* at 82 (emphasis added); Sprint at 28-29; Alpheus at 25; CompTel/ASCENT at 3, 17. That is, they want unbundling first, impairment later. But this is exactly the backwards approach that the Supreme Court and the D.C. Circuit have repeatedly rejected. The CLECs make no pretense that such "presumptions" would fare any better this time around.

Others assert that the "at a minimum" clause in § 251(d)(2) permits the Commission to require unbundling even where it does not find impairment. *See, e.g.*, AT&T at 25-26; Loop & Transport at 26; PACE *et al.* at 32. In *USTA I*, the court found it unnecessary to decide this issue. As the court explained, it could "*assume*" for purposes of its analysis that this was the case, because it had ample reason to vacate the Commission's UNE rules, which were based on the plainly insufficient "belief in the beneficence of the widest unbundling possible." 290 F.3d at 425 (emphasis added). In *USTA II*, however, the D.C. Circuit squarely ruled on this question

[9] Supplemental Order Clarification, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 9587 (2000) ("*Supplemental Order Clarification*"), *aff'd, Competitive Telecomms. Ass'n v. FCC*, 309 F.3d 8 (D.C. Cir. 2002).

and rejected the CLECs' reading of the "at a minimum" clause. As here, the CLECs argued in *USTA II* that "the 'at a minimum' clause . . . mean[s] that the FCC may order unbundling even in the absence of an impairment finding if it finds concrete benefits to unbundling that cannot otherwise be achieved." 359 F.3d at 579. The D.C. Circuit expressly rejected each of the arguments the CLECs raised, *see id.* at 579-80, and held that, contrary to their claims, the purpose of the "at a minimum" clause is to prevent the Commission from issuing "an unbundling order [that] might adversely affect the Act's other goals" even where the Commission finds impairment, *id.* at 580. That is, impairment is a *necessary, but not sufficient*, condition for the imposition of UNE requirements, and the 1996 Act "mandate[s] . . . consideration" of factors, "such as an unbundling order's impact on investment," that counsel against requiring UNEs even in the face of impairment. *Id.*; *see id.* at 572.

A few commenters read *USTA II* to have affirmed the CLECs' interpretation of the "at a minimum" clause, relying on the D.C. Circuit's statement that § 251(d)(2) is reasonably interpreted to permit the Commission to "examine the full context before ordering unbundling." *Id.*; *see* Loop & Transport at 26; PACE *et al.* at 32. As an initial matter, these commenters ignore the D.C. Circuit's express rejection of their position later in the *USTA II* opinion. But it also is clear that, by "full context," the D.C. Circuit was referring to factors such as the "costs of unbundling" that prevent imposition of UNE requirements even where the Commission finds impairment, not to the possibility that some "context" might permit imposition of a UNE requirement absent a finding of impairment. *USTA II*, 359 F.3d at 572. Indeed, the court expressly found that, even after finding impairment, the Commission would "*then* . . . examine

the full context *before* ordering unbundling," with "the costs of unbundling brought into the analysis" at that stage. *Id.* (emphases added).

Nor is there any merit to MCI's claim that the D.C. Circuit's recognition that UNE rules will "inevitab[ly]" have "*some* over- and under-inclusiveness," *id.* at 570, means that the Commission can order unbundling even in markets where there is no impairment. *See* MCI at 20. The D.C. Circuit's statement — which recognized that crafting unbundling rules ultimately involves some line drawing — was made in the context of an issue as to which the court described the "record on the matter [a]s mixed." *USTA II*, 359 F.3d at 570. That statement provides no cover for requiring UNEs where — as here — the record is not mixed and the Commission cannot find that carriers are impaired without UNEs.

b. A finding of impairment must be based on substantial record evidence — not conclusory assertions, anecdotal claims, or speculation — and the Commission must also consider evidence demonstrating that competition is possible without UNEs.

i. The Commission cannot impose UNE requirements without first finding impairment and it may not find impairment unless "substantial evidence" demonstrates that carriers would be impaired without access to a particular network element as a UNE. *USTA II*, 359 F.3d at 582. It is, therefore, the CLECs' burden in the first instance to come forward with such evidence, and there is no merit to the claims of various CLECs that it is incumbents' burden to "disprove impairment." PACE *et al.* at 64; *see, e.g.*, MCI at 146; McLeod at 25-26, 29-30. Indeed, the text of the 1996 Act — which requires the Commission to make (and support) an affirmative finding of impairment before ordering unbundling — cannot be read to impose an obligation on ILECs to prove that there is no impairment; that is, to require incumbents to prove

a negative. This is particularly true where it is the CLECs that have in their possession the most relevant evidence in determining whether there is impairment, and where those CLECs have continued their game of "hide the ball," by refusing to submit any of that data for the Commission to review.

For this very reason, Verizon and other incumbents filed a motion requesting that the Commission require CLECs to provide evidence to substantiate their claims of impairment — for example, complete information regarding their deployment of facilities, their use of third-party facilities to provide local services, and their use of special access to provide service to their customers.[10] Sprint, likewise, recognizes that, to make valid impairment findings, the Commission must require CLECs and wholesalers to submit such information. *See* Sprint at 28-29.[11] The Commission has not ruled on this motion, and, true to form, not a single CLEC has voluntarily submitted this information. None of the CLECs has included maps or other evidence detailing where and how they provide service to their customers — whether through their own facilities or through leased facilities, including special access — and where and how they offer wholesale access to their own facilities.[12] Many competitors that are successfully competing

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[10] *See* Emergency Request for Access to CLEC Data Relevant to the Impairment Inquiry at 8-9, WC Docket Nos. 04-313, *et al.* (FCC filed Sept. 17, 2004) ("Emergency Request for Access to CLEC Data").

[11] Sprint, however, would have the Commission order unbundling based on a presumption of impairment while the Commission waits for this information to be submitted. *See* Sprint at 28-29. As explained above, this "unbundling first, impairment later" approach cannot be squared with the 1996 Act or binding judicial precedent.

[12] XO is the only competitor to submit any maps at all, and it submitted only a single map of a fiber ring it has deployed in San Francisco. *See* XO's Tirado Decl. ¶ 14 & Attach. A. Even though that lone map is far from sufficient to constitute substantial evidence in support of XO's claims of impairment, the map supports Verizon's position here because it demonstrates, as do Verizon's own maps, that CLECs are actually competing to serve customers wherever demand

without UNEs — including all of the cable companies — have declined to file any comments at all in this proceeding. *See* Attachment K.[13] Although Verizon has submitted all of the relevant information to which it has access, there necessarily are limits on the information Verizon can compile about its competitors' networks. Those limits do not apply to the competitors themselves.

And *claims* are all that the CLECs have submitted. They provide anecdotes, assertions, and conclusory statements that they are impaired.[14] But the law is clear that these do not constitute substantial evidence. *See Timpinaro v. SEC*, 2 F.3d 453, 459 (D.C. Cir. 1993); *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 866 (D.C. Cir. 2001); *United States v. Undetermined Quantities of Various Articles of Drug . . . Equidantin Nitrofurantoin Suspension*, 675 F.2d 994, 1000 (8th Cir. 1982). Moreover, because these commenters have withheld all detailed evidence of the manner in which they are currently competing without UNEs or enabling others to do so, the Commission lacks the most relevant evidence necessary to make "a fair estimate of the worth" of the claims these CLECs have presented. *Epilepsy Found. of Northeast Ohio v. NLRB*, 268 F.3d 1095, 1103 (D.C. Cir. 2001) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490 (1951)).

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for high-capacity services exists, including customers located some distance from CLECs' fiber rings.

[13] As is discussed in detail below, *see infra* pp. 59-61, and in the Declaration of Lynn Walker, the same was true of in the proceedings the state commissions conducted pursuant to the Commission's unlawful delegations of authority.

[14] *See, e.g.*, Loop & Transport at 57 (relating 18-month-old anecdote about one CLEC's experience with BellSouth converting special access circuits to UNEs); AT&T at 149-50 (addressing the terms of one specific special access tariff offered by SBC); *id.* at 63 (asserting without support that "the factual record proves that competitors in fact virtually never offer capacity at wholesale"); CompTel/ASCENT at 22 (bare assertion that "competitive entry based on Special Access services is virtually non-existent today").

These competitors' intent is plain — indeed, Sprint (at 28-29) argues for it expressly. They want the Commission to presume impairment and order unbundling *before* they are forced to reveal the evidence that would thoroughly undermine their claims of impairment. Thus, even though "it would hardly seem a difficult matter for the [Commission] to have compiled [this] data," *Timpinaro*, 2 F.3d at 459, these CLECs have placed the Commission in an untenable position by refusing to submit information to which they have unique access. The Commission, therefore, lacks access to the information most relevant to assessing the CLECs' claims of impairment. Consistent with well-settled precedent, the Commission should find that the CLECs' failure to produce "relevant evidence within [their] control" "gives rise to an inference that the evidence is unfavorable to [them]." *International Union, UAW v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972).

The CLECs' failure to submit substantial evidence is also contrary to the Commission's decisions in the context of § 271 applications. In those proceedings, the Commission has repeatedly refused to credit CLEC claims that, no different from those here, were "anecdotal," "merely conclusory," or "general assertions" without any "detailed analysis." *New Jersey 271 Order*[15] ¶¶ 126, 151, 184-185.[16] There is no reason for the Commission to assign greater weight to such insufficient claims in the context of assessing impairment and requiring unbundling.

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[15] Memorandum Opinion and Order, *Application by Verizon New Jersey Inc., et al., for Authorization To Provide In-Region, InterLATA Services in New Jersey*, 17 FCC Rcd 12275 (2002) ("*New Jersey 271 Order*").

[16] *See also* Memorandum Opinion and Order, *Joint Application by BellSouth Corporation, et al., for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, 17 FCC Rcd 9018, ¶ 267 (2002); Memorandum Opinion and Order, *Application by SBC Communications Inc., et al., Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas*, 15 FCC Rcd 18354, ¶ 372 (2000), *appeal dismissed, AT&T Corp. v. FCC*, No. 00-1295 (D.C. Cir. Mar. 1, 2001); Memorandum Opinion

Nor can the Commission, as the CLECs would have it do, make findings of impairment based solely on "argument[s] in a brief."[17] At oral argument in *USTA II*, the D.C. Circuit judges made clear that such "findings" do not pass the substantial evidence test:

> [W]hat I'm troubled by is that after the Commission puts out the allegations, the next paragraph says the Commission makes a finding. How can you make findings on the basis o[f] what one party asserts? Is there evidence in the record that supports this or are these just assertions?[18]

In sum, the CLECs' patent failure to provide the very evidence that is key to the Commission's ability to evaluate their claims, let alone to carry their burden, precludes the Commission from finding impairment and, therefore, from imposing UNE requirements.

ii. The substantial evidence standard requires the Commission to consider "not only the evidence" that could support a finding of impairment, "but also whatever in the record fairly detracts from [the] weight" of that evidence. *Mathews Readymix, Inc. v. NLRB*, 165 F.3d 74, 77 (D.C. Cir. 1999) (internal quotation marks omitted). As Verizon explained, this means the Commission must consider all of the evidence in the record that contradicts the competitors' claims of impairment or demonstrates that unbundling should not be ordered notwithstanding the competitors' showing. This includes evidence demonstrating that competition is possible (or is actually occurring) in the very markets or market segments where certain competitors assert that

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and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953, ¶ 295 (1999), *aff'd, AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000).

[17] Transcript of Oral Argument at 32, *USTA II*, Nos. 00-1012, *et al.* (D.C. Cir. Jan. 28, 2004)

[18] *Id.* at 32-33.

they are impaired, that CLECs possess countervailing advantages that ILECs do not,[19] and the "costs of unbundling," such as "an unbundling order's impact on investment." *USTA II*, 359 F.3d at 572, 580.

Commenters offer a variety of reasons why the Commission need not consider the costs of unbundling notwithstanding *USTA II*. There is no merit to any of these claims. As the D.C. Circuit held, the 1996 Act, "as interpreted by the Supreme Court in [*Iowa Utilities Board*], . . . *mandate[s] exactly such consideration*." *Id.* at 580 (emphasis added). ALTS, nonetheless, contends that, because the Commission has considered such costs in refusing to order unbundling of broadband facilities, it is free to ignore those costs in the context of narrowband facilities. *See* ALTS *et al.* at 36. But nothing in the 1996 Act, *USTA II*, or prior binding decisions supports such a bifurcation of the Commission's obligation to consider these costs. PACE, in contrast, claims that the costs of unbundling are sunk and therefore can be ignored. *See* PACE *et al.* at 10. But it is beyond serious dispute that UNE requirements impose continuing costs on incumbents, competitors, and society, not only by dampening investment incentives, but also because of the costs of managing such extraordinary sharing requirements. *See USTA I*, 290 F.3d at 427; Manufacturing Coalition at 4-9, 14-15; Renaissance Reply at 6; Kahn/Tardiff Reply Decl. ¶¶ 3, 6-7, 16-18, 20. Sprint, however, denies that unbundling ever imposes costs — even where it is undisputed that CLECs can compete without UNEs — because CLECs purportedly will not rely

[19] Among other things, CLECs are "free of any duty to provide underpriced service to rural and/or residential customers and thus of any need to make up the difference elsewhere." *USTA I*, 290 F.3d at 423. PACE contends (at 85) that the Commission's impairment analysis must consider a CLEC that intends to be a "universal competitor," but that amounts to a claim that a CLEC can be deemed impaired when it voluntarily gives up one of its greatest advantages over the ILEC. But the impairment analysis must be focused on *competition*, not the interests of individual competitors or classes of competitors. *See infra* pp. 20-22.

on UNEs unless they are impaired. *See* Sprint at 18, 25-26. But this is precisely the view that the Supreme Court rejected in *Iowa Utilities Board*, recognizing that it unlawfully "allows entrants, rather than the Commission, to determine whether" there is impairment. 525 U.S. at 389 (explaining the Commission's view at the time that "no rational entrant would seek access to network elements from an incumbent if it could get better service or prices elsewhere").

2. The fundamental question posed by the impairment standard is whether competition is *possible* — not whether actual competition is already occurring or whether markets are already fully competitive. *See* Verizon Comments at 12-14.

The 1996 Act makes clear that impairment turns on the "ability" of competitors to enter the market without UNEs, not on whether carriers are actually competing without UNEs, let alone whether markets already are fully competitive. 47 U.S.C. § 251(d)(2); *see also Iowa Utils. Bd.*, 525 U.S. at 390 & n.11. Consistent with the statute and the Supreme Court's construction, the D.C. Circuit has repeatedly reaffirmed that the critical inquiry is whether CLECs are *capable* of competing without UNEs — that is, whether "competition is possible" without UNEs in a particular market. *USTA II*, 359 F.3d at 575; *USTA I*, 290 F.3d at 427 (impairment exists only for those network elements that are "*unsuitable* for competitive supply") (emphasis added). A backward-looking focus on whether actual competition exists or whether a market is already fully competitive, therefore, is inconsistent with the 1996 Act. An element can be "suitable for competitive supply" regardless of whether (and long before) three or four companies are already competitively supplying that element. *USTA II*, 359 F.3d at 571. To be sure, the fact that a competitor is, or competitors are, already providing service in a given market segment does show that there is an absence of impairment in that market segment. But it also proves much more.

As the D.C. Circuit emphasized, such competition also shows that there is no impairment, because competition is possible, in other, similar market segments, even if there are, as of yet, few or even no competitors providing service in those market segments. *See id.* at 575; *infra* p.34.

A number of commenters argue that the impairment test adopted in the *Triennial Review Order* — that is, the first two sentences of paragraph 84 of that order — can be readopted here because it was not questioned by the D.C. Circuit in *USTA II*. *See, e.g.*, AT&T at 4, 9; MCI at 18-19; ALTS *et al.* at 7; CompTel/ASCENT at 3, 6. Although the D.C. Circuit noted that, in the abstract, the Commission's third formulation of its test might be "an improvement over the Commission's past [vacated] efforts," that court also made clear that whether the Commission uses the right words is irrelevant if the Commission applies the test in a manner that is inconsistent with the 1996 Act. *USTA II*, 359 F.3d at 571. As the D.C. Circuit explained, the "the Commission's impairment standard . . . finds concrete meaning only in its application, and only in that context is it readily justiciable." *Id.* at 572.

And it is in the realm of application of that test where the CLECs' proposals would lead the Commission to a fourth consecutive vacatur. ALTS, for example, argues that the Commission must assess "impairment based solely on *actual deployment* of facilities in particular customer locations." ALTS *et al.* at 64. Other CLECs propose tests that would require four or five competitors already having entered the market before the Commission could find that competition is, in fact, possible without UNEs. *See, e.g.*, Loop & Transport at 82-86. Sprint goes further, claiming that assessing whether competition is possible is "inevitably subjective, arbitrary, unmanageable, and lacking any foundation in the real world of

impairment," and that the Commission, therefore, should limit is inquiry to determining where actual competition exists. Sprint at 30-31. These claims cannot be squared with the 1996 Act's focus on the "ability" to compete, the Supreme Court's admonition that the Commission, not competitors, must determine where impairment exists, and the D.C. Circuit's repeated conclusion that the impairment inquiry turns on whether competition is *possible*, not whether actual competition already exists. Indeed, Sprint and the other commenters do not even try.

3. The impairment analysis also must focus on whether *competition* is possible — not on the interests of individual competitors, classes of competitors, or technologies. *See* Verizon Comments at 14-16.

As the courts have made clear, the impairment standard must be interpreted using a "limiting" principle that is "rationally related to the goals of the Act," namely, to "stimulate *competition*." *Iowa Utils. Bd.*, 525 U.S. at 388; *USTA II*, 359 F.3d at 576 (emphasis added). The purpose of the 1996 Act is thus to benefit *consumers*, not particular competitors. *See USTA I*, 290 F.3d at 429 (1996 Act does not authorize the Commission "to inflict on the economy the sort of costs" associated with unbundling without "reason to think doing so would bring on a significant enhancement of *competition*") (emphasis added); *see also Marrese v. American Acad. of Orthopaedic Surgeons*, 706 F.2d 1488, 1497 (7th Cir. 1983) (Posner, J.) ("policy of competition is designed for the ultimate benefit of consumers rather than of individual competitors"), *rev'd on other grounds*, 470 U.S. 373 (1985). Where consumers are already obtaining the benefits of competition, the Commission cannot find impairment and, thereby, permit CLECs to use TELRIC-priced UNEs to compete not only with incumbents, but also with other competitors that receive no such subsidy. Thus, in *USTA II*, the D.C. Circuit found that,

because "intermodal competition in broadband" already gives "mass market consumers . . . the benefits of competition," there is no impairment even if the lack of UNEs would result in "all CLECs [being] driven from the broadband market." 359 F.3d at 580, 582.

AT&T, however, argues at length that the Commission must conduct a "carrier specific" impairment test. AT&T at 14; *see id.* at 18, 38-39, 63-64, 75. AT&T goes so far as to claim that "the mere fact that one, or two, or three carriers" are actually competing to serve a particular location using self-deployed facilities "does not mean that *any* other carrier" is not impaired. *Id.* at 63. In other words, AT&T contends that, even if there were 10 competing carriers, including the incumbent, and each was serving a roughly equal share of the market, the incumbent would still be require to provide UNEs to additional CLECs. Indeed, according to AT&T, even if CLECs already serve *every customer* in a particular market using their own facilities, other CLECs must still be permitted to enter that market using UNEs. But the D.C. Circuit has flatly rejected this reading of the 1996 Act, finding it "quite unreasonable." *USTA I*, 290 F.3d at 429. Indeed, where carriers are already competing without UNEs, it would be anticompetitive — and harmful to consumers — to add "synthetic competition" to that market by enabling other entrants to use UNEs to undercut the carriers already in the market. *Id.* at 424. And in *USTA II*, as explained above, that court held that the Commission cannot require unbundling where consumers are receiving the benefits of competition even if the consequence is that all "CLECs proved unable to compete." 359 F.3d at 580. Therefore, that a particular individual competitor, or class of competitors, might not be able to enter the market without UNEs is irrelevant to the impairment inquiry, not central to it, as AT&T claims.

For the same reasons, it is immaterial to an impairment analysis whether the competing providers that have entered choose to make their facilities to other CLECs on a wholesale basis. The purpose of the 1996 Act is to promote competition, not to further the interests of particular competitors or to ensure that individual competitors have enduring wholesale suppliers. Therefore, as long as "competition is possible" without UNEs in a particular market, *USTA II*, 359 F.3d at 575, there can be no finding of impairment because consumers will obtain the benefit of that competition, even if particular competitors are unable to enter using wholesale facilities offered by the carriers that are actually competing.

4. *All* available means of providing service in competition with incumbent local exchange carriers must be considered. *See* Verizon Comments at 16-21.

a. Repeated judicial decisions confirm that the Commission must consider competition through competing platforms that do not utilize the incumbents' networks at all. *See USTA II*, 359 F.3d at 572-73 ("the Commission cannot ignore intermodal alternatives"); *USTA I*, 290 F.3d at 429; *Iowa Utils. Bd.*, 525 U.S. at 389. Intermodal competition is the norm in other capital intensive industries, as railroads compete not only with other railroads, but also with barges, trucks, and airplanes. Passenger airplanes compete among themselves, as well as with passenger railroads, buses, and cars. These intermodal alternatives provide comparable, though not identical, services, enabling both price and non-price competition for the same basic task — here, carriage from point A to point B. *See* Kahn/Tardiff Reply Decl. ¶¶ 6, 25-26. Indeed, under the 1996 Act, intermodal competition should be the *favored* method of competing with incumbents, because true competition occurs only with respect "to 'unshared' elements," which is true of intermodal competitors by definition. *Verizon*, 535 U.S. at 510 n.27; *see Iowa Utils.*

Bd., 525 U.S. at 429 (Breyer, J., concurring in part and dissenting in part) ("It is in the *un*shared, not in the shared, portions of the enterprise that meaningful competition would likely emerge."); *UNE Remand Order*[20] ¶ 112 (only where competitors have "direct control of their networks" can they "ensure the quality of their service and to offer products and pricing packages that differentiate their services from the perspective of end users").

As Verizon has demonstrated, intermodal competition precludes a finding of impairment as to mass-market switching. Recognizing this, the CLECs argue strenuously that the Commission should simply ignore this widespread competition. Tellingly, AT&T — which has abandoned circuit-switched mass-market service in favor of VoIP — makes none of these arguments and, in fact, "no longer seeks permanent rules that require the unbundling of mass market switching and the maintenance of UNE-P." AT&T at i. AT&T's decision to compete in the mass market exclusively through VoIP alone provides a sufficient rejoinder to all of the CLEC claims that VoIP is not in the same market as wireline voice service. But their claims are wrong as a matter of law in any event.

MCI, for example, contends that the competition through VoIP and the cable broadband platform is insufficient to preclude a finding of impairment, because this "duopoly" purportedly "would not be sufficient to ensure competition for local telephone services." MCI at 95-96. Yet this "duopoly" exists only if one ignores competition from wireless and VoIP companies. In addition, the D.C. Circuit has already emphatically rejected MCI's claim. As noted above, that court held that, where there is "robust intermodal competition from cable providers," "consumers

[20] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*"), *vacated, USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 940 (2003).

will still have the benefits of competition *between cable providers and ILECs*" "even if *all CLECs* were driven from the . . . market." *USTA II*, 359 F.3d at 582 (emphases added).

MCI and PACE also seek to exclude intermodal competition by defining the product market in a way that necessarily excludes options like VoIP and wireless. Thus, MCI proposes to define the product market as "the bundle of telecommunications services . . . provided *over a local wireline facility*." MCI at 35 (emphasis added). But the D.C. Circuit has held unambiguously that "the Commission cannot ignore intermodal alternatives," *USTA II*, 359 F.3d at 572-73, which is precisely the purpose and effect of MCI's proposed market definition. MCI also asserts that intermodal alternatives are not "sufficiently comparable to be included in the relevant product market" as wireline service. MCI at 35. This is wrong on the law and the facts. As a matter of law, products are substitutes when they "have the ability — actual or potential — to take significant amounts of business away from each other," and the "relevant product market is composed of products that have reasonable interchangeability for the purposes for which they are produced — price, use and qualities considered." *Allen-Myland, Inc. v. IBM Corp.*, 33 F.3d 194, 206 (3d Cir. 1994) (internal quotation marks omitted). Thus, health maintenance organizations ("HMOs"), fee-for-service plans, and preferred provider organizations ("PPOs") are all part of the same market for health care plans, despite the material differences between them, such as "the restriction on the patient's choice of doctors or [the] fear that HMOs skimp on service." *Blue Cross & Blue Shield United v. Marshfield Clinic*, 65 F.3d 1406, 1410 (7th Cir. 1995) (Posner, C.J.). Likewise, such widely divergent products as "at-shelf coupon dispensers," "newspaper coupons [and] stuck-to-the-product-box coupons" all compete in the same market. *Menasha Corp. v. News America Mktg. In-Store, Inc.*, 354 F.3d 661, 664 (7th Cir. 2004)